GOLDEN VALE GOLF RANGE & COUNTRY CLUB SDN BHD

v.

HONG HUAT ENTERPRISES SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: 22-72-1997]
6 JANUARY 2005

CONTRACT: *Sale and purchase of land - Breach - Whether agreement was a sale and purchase agreement - Whether plaintiff failed to refund sum paid by defendant pursuant to agreement - Whether defendant was defrauded and deprived of rights pursuant to agreement - Contracts Act 1950, s. 17(d)*

LAND LAW: *Sale of land - Breach of contract - Whether agreement was a sale and purchase agreement - Whether plaintiff failed to refund sum paid by defendant pursuant to agreement - Whether defendant was defrauded and deprived of rights pursuant to agreement - Contracts Act 1950, s. 17(d)*

COMPANY LAW: *Separate legal entity - Veil of incorporation - Companies as agents and nominees of alter ego - Fraud - Whether corporate veil ought to be lifted - Contracts Act 1950, s. 17(d)*

This was a claim by the plaintiff ('Golden Vale') against the defendant ('Hong Huat') for vacant possession and damages for trespass of an undivided share of a piece of land ('Lot 28') as well as an account of all the rentals and/or profits derived by Hong Huat during the tenure of its sand-mining activities. Hong Huat, alternatively, claimed: (i) against 3rd party no. 1 ('Airport Auto') for damages for breach of contract and indemnity, interest and costs; (ii) against 3rd party no. 2 ('Madam Chun') for an order that she do cause Golden Vale to specifically transfer to Hong Huat the undivided share in Lot 208, and costs; and (iii) against Golden Vale, a counterclaim for specific performance. In this multipartite civil action, Madam Chun held controlling interest over Golden Vale while Airport Auto was her agent in the purchase of Lot 208 from the Official Receiver.

On 10 June 1993, Airport Auto, as the beneficial owner of Lot 208, entered into a sale and purchase agreement with Hong Huat, whereby Airport Auto sold the undivided share in Lot 28 to Hong Huat for RM200,000; Hong Huat actually paid the excess sum of RM282,000 to Airport Auto. On 9 December 1994, Madam Chun, as director of Golden Vale, caused Lot 208 to be transferred to Golden Vale. Madam Chun did not give evidence as a witness, but her husband Wu (an undischarged bankrupt) gave evidence to the effect that he was acting on his wife's behalf and with her consent, knowledge and authority. He testified that the sale and purchase agreement was a guarantee or security agreement whereas Hong Huat submitted that the real transaction between Hong Huat and Airport Auto concerned the sale and purchase of the undivided share in Lot 208. Hong Huat also averred that Airport Auto had not refunded the sum of RM282,000. Finally, Hong Huat contended that Madam Chun, with her husband Wu as the mastermind, was the alter ego of Airport Auto and Golden Vale and that they were trying to defraud Hong Huat to achieve unjust personal gains.

Held (dismissing the plaintiff's claim and allowing the defendant's claim and counterclaim):

[1] Applying the principles enunciated in *Sia Sew Hong & Ors v. Lim Gim Chian & Anor* and the findings of the Court of Appeal in *Hong Huat Enterprise Sdn Bhd v. Golden Vale Golf Range & Country Club Sdn Bhd* together with the facts and evidence of this instant case, there was no doubt that the intention of the parties *viz* Hong Huat and Airport Auto, as expressed in the sale and purchase agreement, was to effect the sale and purchase of the undivided share in Lot 208. (p 297 b-c)

[2] If at all Airport auto had made the repayment, it would certainly have documented such repayment in the form of a payment voucher or a cheque in order to prepare the annual statutory accounts under the Companies Act 1965 and Income Tax Act 1976. The fact that Airport Auto had failed to produce the documents evidencing the payment clearly showed on a balance of probabilities that Airport Auto had failed to discharge the burden of proof in relation to the repayment. In the circumstances, it was a specific finding of fact that Airport Auto had not repaid Hong Huat the sum of RM282,000 paid by Hong Huat to Airport Auto pursuant to the sale and purchase agreement. (p 299 f-g)

[3] The conduct, on the facts, of Madam Chun, both individually and through her husband Wu, had been cumulatively designed for the purpose of defrauding Hong Huat *ie*, to deprive Hong Huat of the rights and interest under the sale and purchase agreement, and that clearly constituted fraud as defined in s. 17(d) of the Contracts Act 1950. As Madam Chun had, at the material time, been in effective control of Golden Vale and Airport Auto, it was fitting and proper that the corporate veil of Golden Vale and Airport Auto be lifted. Thus, Madam Chun, at that time, was the alter ego of Golden Vale and Airport Auto. (pp 302 c-d & 303 b-c)

Case(s) referred to:

Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd & Ors [1996] 2 AMR 2100 ***(foll)***

Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(refd)***

Armagas Ltd v. Mundogas SA; The 'Ocean Frost' [1985] 1 Lloyd's Rep 1 ***(refd)***

Aspatra Sdn Bhd & Ors v. Bank Bumiputra Malaysia Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez Anor [1989] 1 MLJ 35 ***(foll)***

Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 CA ***(refd)***

Hong Huat Enterprise Sdn Bhd v. Golden Vale Golf Range & Country Club Sdn Bhd [2001] 1 CLJ 181 CA ***(foll)***

Lim Tai Ming & Sons Credit Sdn Bhd v. Lim Tuck Thien [2001] 1 CLJ 316 CA ***(refd)***

Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(refd)***

Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 167, 172

Contracts Act 1950, s. 17(d)

For the plaintiff - Avatar Singh (Hillary D'Cruz); M/s Mohd Latip & Assoc

For the defendant - Wong Kim Fatt (Yong Chen Lim); M/s Yong Chen Lim & Saridah

For the 1st third party - Moi Teck Seng; M/s Tan & Yeo

For the 2nd third party - KP Ng; M/s KP Ng & Amardas

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Parties

This is a multipartite civil action, involving:

1. Plaintiff : Golden Vale Golf Range and Country Club Sdn Bhd. ("Golden Vale")
2. Defendant : Hong Huat Enterprises Sdn. Bhd. ("Hong Huat")
3. Third Party 1 : Airport Auto Centre Sdn Bhd ("Airport Auto")
4. Third Party 2 : Madam Chun Nyook Lin ("Madam Chun")

Subject Matter

The subject matter herein concerns 4/10 undivided share ("the undivided share") in a piece of land known as Lot 208 held under Grant No. 4749, the whole land measuring in area 105.96 acres, in the mukim of Batang Melaka, district of Jasin, state of Melaka ("Lot 208").

Claims And Counterclaims

Golden Vale's claims against Hong Huat are for vacant possession and damages for trespass of Lot 208, as well as an account of all the rentals and/or profits derived by Hong Huat during the tenure of its sand mining activities.

Hong Huat claims:

1. against Airport Auto for damages for breach of contract and indemnity, interest and costs;
2. against Madam Chun, an order that she do cause Golden Vale to specifically transfer to Hong Huat the undivided share in Lot 208 and costs;
3. against Golden Vale, a counterclaim for specific performance.

Hobson's Choice

Before I embark on the finding of facts and the rest of my judgment, it is perhaps pertinent for me to point out that Golden Vale, Airport Auto and Madam Chun as a group of litigants on one side of the fence, and Hong Huat as a party on the opposite side, have either intentionally or unintentionally decided not to call the most important witnesses *viz* Madam Chun and Kwa Cheng Wee respectively to testify in court in order to enable or assist me in arriving at the true position surrounding the transactions which have now apparently turned sour or fallen apart.

Given this backdrop, it appears that I have been left with Hobson's choice ie, to avail myself of the second best evidence adduced from non-parties and to do my utmost to judicially appreciate the evidence, both oral testimony and contemporaneous documents, adduced and produced in these proceedings, for the purpose of discovering where the truth lies in this particular case.

Decision Sought

The sale and purchase agreement executed between Airport Auto and Hong Huat dated 10 June 1993 is the agreement on which the decision of this court is sought as to whether Airport Auto and Madam Chun had breached it.

Finding Of Facts

After conducting a full trial, I now set out my finding of facts.

On 9 May 1988, Jaytra Sdn. Bhd had been wound up by an order of the High Court ("the wound-up company").

On 20 October 1991, a sand mining agreement was executed between the wound-up company and Hong Huat, wherein an undischarged bankrupt, one Wu Soo Hwa @ Ngo Sur Hua ("Wu") signed for the wound-up company.

On 4 December 1992, Wu appointed himself as general manager of the wound-up company, besides appointing himself and his wife Madam Chun as the directors thereof. Wu had also filed a false declaration in Form 48A dated 3 December 1992 in which he had stated that he was not an undischarged bankrupt, notwithstanding his capacity to the contrary.

Although the tribute due to the wound-up company in the sand mining agreement should have been paid to official receiver as the liquidator, it was nevertheless paid to Wu's wife, Madam Chun, as both of them effectively controlled the wound-up company. This sand mining agreement is invalid and unenforceable: see the judgment of Siti Norma Yaakob JCA (now FCJ) in *Hong Huat Enterprise Sdn Bhd v. Golden Vale Golf Range & Country Club Sdn Bhd* [2001] 1 CLJ 181. All the parties herein have referred to this authority wherein the Court of Appeal and the High Court had dismissed Hong Huat's application for mandatory injunction.

Vide agreement dated 31 May 1993, Airport Auto as agent of Madam Chun purchased, *inter alia*, Lot 208, from the official receiver as liquidator of the wound-up company, the vendor, with the concurrence of the chargee, Bank Utama.

Golden Vale was incorporated on 11 September 1993, with Madam Chun holding one of the two shares as director in 1993, 1994, 1 October 1995 and also as at 30 September 1996. In 1997, after the transfer on 18 July 1994 of Lot 208 to Golden Vale, she bought 49,999 shares so as to maintain her controlling interest of 50,000 shares out of the 100,000 shares issued in Golden Vale. Effectively, all the shares are within her family and her control as the managing director.

On 10 June 1993, Airport Auto as beneficial owner of Lot 208 entered into a sale and purchase agreement with Hong Huat ("the sale and purchase agreement") whereby Airport Auto sold the undivided share in Lot 208 to Hong Huat for RM200,000. Both the sale and purchase agreement and Airport Auto directors' resolution for the sale and purchase thereof dated 10 June 1993 were signed by Madam Chun. The directors' resolution referred to the same transaction ie, the sale and purchase agreement for the sale and purchase of the undivided share in Lot 208 for a consideration of RM200,000 which had been fully paid by Hong Huat, with an excess sum of RM82,000, amounting to RM282,000.

Clauses 20 and 21 of the sale and purchase agreement are succession clauses which bind Airport Auto and its successor in title ie, Golden Vale.

Although Golden Vale was not a party to the sale and purchase agreement, it is the nominee of Airport Auto, as averred in para 23 of Madam Chun's defence. Golden Vale is Madam Chun's nominee and Airport Auto is Madam Chun's agent.

On 9 December 1994, Madam Chun caused Lot 208 to be transferred to Golden Vale which Madam Chun controlled and accepted the transfer in Form 14A as a director of Golden Vale (paras 9 and 10 of Airport Auto's defence).

As alluded to above, Madam Chun did not give evidence as a witness, but her husband Wu gave evidence to the effect that he was acting on his wife's behalf and with her consent, knowledge and authority.

Wu testified that the sale and purchase agreement was a guarantee or security agreement, but DW1 Kwa Soon Seng ("DW1 Kwa") (to distinguish it from Kwa Cheng Wee who is a non-witness) testified that it was a sale and purchase of the undivided share in Lot 208, and that RM62,000 had been paid to Bank Utama as deposit for the purchase from the wound-up company of five pieces of land, one of which was Lot 208.

Madam Chun also signed the accounts of Golden Vale and Form 34C evidencing the charge on Lot 208, for the benefit of another company known as Jati Erat Sdn Bhd.

There are however two areas of dispute here *viz.*:

1. Whether the sale and purchase agreement is indeed a sale and purchase agreement, which involves a question of mixed law and fact; and

2. Whether Airport Auto has repaid RM282,000 to Hong Huat pursuant thereto, which involves a question of fact.

My specific finding in relation to these two areas of dispute will appear later in this judgment.

Real Transaction

Learned counsel Dr. Wong Kim Fatt, assisted by Mr. Yong Chen Lim, submitted for Hong Huat that the real transaction between Hong Huat and Airport Auto concerns the sale and purchase of the undivided share in Lot 208 and not a guarantee or security agreement to recover a loan made by Hong Huat to Airport Auto.

On the other hand, learned counsel for all the other parties herein *viz* for Golden Vale, Mr. Hillary D'Cruz together with Mr. Avatar Singh; for Airport Auto, Mr. Moi Teck Seng; and for Madam Chun, Mr KP Ng unanimously contended that the sale and purchase agreement was actually not a sale and purchase transaction as such, but it was really meant to secure a loan.

It was also submitted for Golden Vale that the court is generally not bound by the label attached to a document, relying on *Sia Siew Hong & Ors. v. Lim Gim Chian & Anor*. [1996] 3 CLJ 26 CA; and that the words used in the sale and purchase agreement did indicate the ultimate intention of the parties.

It was further argued for Airport Auto that the sale and purchase agreement was a conditional agreement and until such time that Airport Auto had acquired the legal and beneficial interest, the sale and purchase cannot be specifically performed, and that it was at an end by reason of the breach on the part of the defendant in that apart from the deposit of RM62,000 which did not work out to be the conventional 10% deposit in a sale and purchase agreement, the balance of RM138,000 has not been paid by Hong Huat, as no mention was made of the advances of RM282,000 made towards the purchase price.

The additional point taken for Madam Chun is that a sum of RM282,000 inclusive of RM62,000 had been advanced by Hong Huat to Airport Auto between 2 October 1992 and 5 July 1994, and that the advance of RM62,000 *vide* UMBC cheque No. 634907 dated 10 October 1992 was made as payment to Bank Utama being 1% deposit or earnest money for the purchase price of RM6.2 million for five pieces of land, including Lot 208, on condition that upon completion of the purchase, Airport Auto was to sell Lot 208 to Hong Huat for RM500,000 which was different from the sale and purchase of the undivided share in Lot 208 for RM200,000 which Hong Huat has never paid to Airport Auto.

I am of the view that the answer to the diametrically opposite contentions may be found in the Court of Appeal judgment in *Hong Huat Enterprise, supra,* Siti Norma Yaakob JCA (now FCJ) adverted to the sale and purchase agreement as specifically for Lot 208, adding that it was not disputed that Hong Huat had also paid the balance sum in full. I am therefore unable to accept Airport Auto's contention that the sale and purchase agreement was a conditional agreement. Further, Abu Mansor JCA (later FCJ) also referred to the effect of the sale and purchase agreement in which Airport Auto would sell and transfer the undivided share in Lot 208 for the sum of RM200,000.

In addition to the above findings of the Court of Appeal, there are before me other oral and documentary evidence from which the intention of the parties in relation to the real transaction may be further ascertained. I shall evaluate the oral evidence and construe the contents of all the documents executed by the parties thereto. One such document is obviously the "director's circular resolution" of the vendor, Airport Auto, which was signed by Madam Chun contemporaneously with her execution of the sale and purchase agreement. That resolution has expressly stated, *inter alia*, that "the company sells 40% of all that pieces (sic) of land known as Lot 208 ...".

The sale and purchase agreement and the resolution must be evaluated in conjunction with Wu's evidence in which he had admitted that the sale and purchase agreement was for the sale and purchase of the undivided share in Lot 208.

I shall now consider the judgment of the Court of Appeal in *Sia Siew Hong, supra*, delivered by Gopal Sri Ram JCA and cited for Golden Vale, Airport Auto and Madam Chun. There, a document entitled "Guarantee for debts" contained a deeming clause to make the appellants "principal debtors". Such deeming provision was held by the Court of Appeal to point

to the document being an indemnity rather than a guarantee. The learned judge of the Court of Appeal made it abundantly clear that in the construction of contracts, the court is not bound by the labels that parties choose to affix onto the particular document, and that the clear duty of the court is "to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport".

I hereby apply the principles enunciated in *Sia Siew Hong, supra,* and hold that in a nutshell, the findings of the Court of Appeal in *Hong Huat Enterprise, supra,* manifested through the aforesaid two Court of Appeal Judges, together with the directors' resolution of Airport Auto and Wu's admission left me with no doubt that the intention of the parties *viz.* Hong Huat and Airport Auto as expressed in the sale and purchase agreement is to effect the sale and purchase of the undivided share in Lot 208.

Refund Of RM282,000?

It was submitted for Hong Huat that the evidence of DW1 Kwa shows that Airport Auto the vendor has never refunded the sum of RM282,000 to Hong Huat, and that Madam Chun had paid RM282,000 to one Hock Seng Mining Sdn Bhd ("Hock Seng") as commission for the sale of her 60% shares in Airport Auto to Gombak Land Sdn Bhd ("Gombak Land"), which was a separate transaction involving a separate company and is not an issue before the court.

It was argued for Golden Vale that the two distinct expressions *viz* "amount outstanding from Madam Chun Nyook Lin" and "commission payable to Mr. Heng Weng Loong" used in exh. B66 ie, the letter from Hock Seng to Madam Chun referred to the repayment of one and the only sum of RM282,000, and that Hong Huat's rights, if any, stemming from the sale and purchase agreement have been fully satisfied by such repayment, leaving Hong Huat with no remedy whatsoever against Golden Vale.

In relation to the sum of RM282,000, Airport Auto contended that it had repaid it in full by way of set-off from the sale of Madam Chun's shares in Airport Auto to Hock Seng as outlined in the memorandum from one CY Wong to one Peter Yip with a carbon copy to one Kwa Cheng Wee who was dealing with Wu and that the RM282,000 did not represent the reduced commission of RM500,000. Coincidentally, Madam Chun shares this submission also.

I shall refer to the Court of Appeal judgment in *Hong Huat Enterprise, supra,* where Siti Norma Yaakob JCA (now FCJ), said that it was not disputed that in addition to the deposit of RM62,000, Hong Huat has also paid up the balance of the purchase price in full amounting to RM282,000.

The evidence of DW1 Kwa was that Airport Auto has never refunded the RM282,000 to Hong Huat. Wu's evidence (adduced for Airport Auto and Madam Chun) confirmed that Airport Auto had no document such as payment voucher or cheque to show the refund of this sum to Hong Huat.

In the light of the conflicting evidence, I will have to analyse the entire oral evidence adduced in the trial and test it against contemporaneous documents in order to arrive at the truth and formulate my specific finding of facts.

This approach has been enunciated by the Supreme Court in *Eastern & Oriental Hotel (1951) Sdn. Bhd. v. Ellarious George Fernandez Anor* [1989] 1 MLJ 35 at 37 SC, where Wan Hamzah SCJ (as he then was) in delivering the judgment of the Supreme Court agreed with the soundness of the observation made in *Armagas Ltd v. Mundogas SA; The 'Ocean Frost'* [1985] 1 Lloyd's Rep. 1 which reads:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

A similar sentiment was expressed by Siti Norma Yaakob JCA (now FCJ) and Haidar Mohd Noor JCA (later CJ (M)) in delivering the judgments of the Court of Appeal in *Guan Teik Sdn Bhd v. Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 CLJ 324; and *Lim Tai Ming & Sons Credit Sdn Bhd v. Lim Tuck Thien* [2001] 1 CLJ 316, respectively.

The evidence adduced before me included exh. C45 ie, the letter dated 4 December 1993 written by Madam Chun's husband Wu to DW1 Kwa, wherein Wu has agreed to pay a commission of RM500,000 to DW1 Kwa upon completion of sale through Hock Seng of Madam Chun's 60% shares in Airport Auto to Gombak Land pursuant to the agreement dated 21 January 1993 executed between Madam Chun and Gombak Land. One Heng Weng Loong, a consultant engineer was a witness for Airport Auto. He testified to such commission and that he had agreed to reduce his commission from RM220,000 to RM200,000.

Hock Seng is not a party in the suit before me. It seems to me that Hock Seng is a different company having separate and distinct transactions with Wu, and that such commission had been reduced to RM282,000.

Exhibit B66 (which is also exh. C64) dated 8 March 1995 is the memorandum from one CY Wong to one Peter Yip, with a carbon copy to one Kwa Cheng Wee in relation to the subject matter of the sale and purchase of 20% Airport Auto shares between Hock Seng and Madam Chun, wherein item (a) referred to, *inter alia*, the payment of the amount of RM282,000 outstanding due to Hock Seng from Madam Chun, as it has been deducted from the figure of RM595,000.

Subsequently, Hock Seng in a letter dated 13 March 1995 in exh. B68 addressed to Madam Chun had confirmed, *inter alia*, that there was no commission payable by Madam Chun to Hock Seng in connection with the purchase of the 60% equity of Airport Auto by Gombak Land.

Wu in his evidence agreed that the sum stated in B66 (which is also C64) and the sum paid by Hong Huat to Airport Auto were entirely two different transactions.

In the light of the above evidence which had been tested against contemporaneous documents, I accept the evidence adduced for Hong Huat to the effect that the sum of RM282,000 referred to in B66 and B68 and the sum paid by Hong Huat to Airport Auto pursuant to the sale and purchase agreement were for entirely different transactions, which had indeed been confirmed not only by Wu who had testified for Golden Vale, Airport Auto and Madam Chun, but also by consultant engineer Heng Weng Loong who had also testified for Airport Auto.

If at all Airport Auto had made the repayment, Airport Auto being a company incorporated under the Companies Act 1965 would certainly have documented the repayments in the form of payment voucher or a cheque as Airport Auto has to prepare annual statutory accounts under Part VI Division I ss. 167 to 172 of the Companies Act 1965 and the relevant provisions of the Income Tax Act 1976. The fact that Airport Auto has failed to produce the documents evidencing the payment clearly shows on a balance of probabilities that Airport Auto has failed to discharge the burden of proof in relation to the repayment.

In the circumstances, it is my specific finding of fact that Airport Auto has not repaid Hong Huat the sum of RM282,000 paid by Hong Huat to Airport Auto pursuant to the sale and purchase agreement.

Lifting The Corporate Veil

It was argued for Hong Huat that Madam Chun was using Airport Auto and Golden Vale as extensions and corporate veils of herself, while her husband Wu was using his bankruptcy veil in order to defraud Hong Huat and to achieve their unjust personal gains. *Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor.* [1987] 2 CLJ 377; 1987] CLJ (Rep) 50 SC; and *Abdul Manaf Mohd bin Ghows & 13 Ors v. Nusantara Timur Sdn Bhd & 2 Ors* [1996] 2 AMR 2100 HC were cited in support of this contention in order to show that Madam Chun was the alter ego of Airport Auto and Golden Vale, with her husband Wu as the mastermind, and that Hong Huat has discharged the burden of proving civil fraud on a balance of probabilities, referring to s. 17 of the Contracts Act 1950; *Ang Hiok Seng @ Ang Yeok Seng v. Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 1 CLJ 497 FC; and *Ong Ban Chai & Ors v. Seah Siang Mong* [1998] 3 CLJ 637 CA.

In response, Golden Vale also relied on *Aspatra, supra,* and *Abdul Manaf, supra,* but argued that the Court of Appeal judgment in *Hong Huat Enterprise, supra,* has ruled that the sale and purchase agreement has created no rights in favour of Hong Huat.

Golden Vale further contended that *vide* agreement dated 21 December 1993, Madam Chun had divested herself of 60% of her shareholding in Airport Auto in favour of Gombak Land pursuant to two agreements both dated 13 March 1995, whereby Hock Seng had acquired a total of 20% of Airport Auto from Madam Chun, who in December 1994 was no longer in control of Airport Auto, but Gombak Land was, and that any allegation of fraud against Madam Chun would be on shaky ground.

It was argued for Airport Auto that there was no basis for Hong Huat's counterclaim for specific performance against Airport Auto as agent for Madam Chun and that Airport Auto was under no obligation to effect the transfer of the undivided share in Lot 208 to Hong Huat.

The stand taken for Madam Chun was that at all material times during the negotiations leading to the sale and purchase agreement, Hong Huat was fully aware that Madam Chun and Wu were in control of Airport Auto, in which case, the issue of lifting the corporate veil to reveal the alter ego of Airport Auto did not arise as the veil was never put on in the first place, and so the issue of civil fraud by Madam Chun did not arise.

It was also canvassed for Madam Chun that the evidence of DW1 Kwa should be rejected as it is inconsistent with contemporaneous documents in particular B66 and B68, seeking support in *Eastern & Oriental Hotel, supra; Guan Teik Sdn. Bhd. v. Haji Mohd Noor bin Haji Yakob, supra;* and *Lim Tai Ming & Sons Credit Sdn Bhd v. Lim Tuck Thien, supra.*

At this juncture, it is appropriate for me to refer to some fundamental principles under this head. In *Aspatra, supra*, one Lorrain exercised effective control of the appellant companies and one of the questions before the Supreme Court was whether Zakaria Yatim J (later FCJ) was correct in lifting the corporate veil so that Lorrain was the alter ego and the assets of the companies were held or deemed to be the assets of Lorrain. The majority judgment of the Supreme Court delivered by Mohamed Azmi SCJ (as he then was) held that the learned first instance judge was correct in lifting the corporate veil, as the court would generally do so in order to do justice particularly when an element of fraud was involved eg, in the receipt of secret profits whatever might be the capacity in which Lorrain had received them.

In *Abdul Manaf, supra,* Anuar J (later CJ (M)) explained at pp. 2111 to 2112 that because a company has a legal personality and a separate legal entity of its own distinct from its members or directors, there have been and will be instances where its members or controllers hide behind its corporate entity or are otherwise hidden from the view or shielded by what has come to be described as its corporate veil to manipulate it fraudulently for unjust personal gains, and that in such an exceptional case, the court, in order to do justice, will not hesitate to lift the corporate veil by cutting across the legal boundary of corporate structure in order to see the faces and discover the true identities of these members or controllers who use the company as an extension of themselves and make them personally liable or responsible for the debts and liabilities of the company where the evidence justifies such a remedy.

I shall now revert to my finding of facts as narrated above, specifically the fact that Madam Chun has played a pivotal role in the execution of the following important documents:

1. the agreement dated 31 May 1993 for Airport Auto as purchaser;
2. the sale and purchase agreement for Airport Auto as vendor;
3. the directors' resolution of Airport Auto;
4. the transfer form in Form 14A for Golden Vale;
5. Form 34C evidencing the charge on Lot 208; and
6. Golden Vale's accounts.

It is also significant to note that in the Court of Appeal judgment in *Hong Huat Enterprise, supra,* Siti Norma Yaakob JCA (now FCJ) stated that interestingly when Airport Auto did not exercise the final option to repurchase, Jaytra (wound-up company) through Madam Chun and her husband Wu had transferred the whole of the land to Golden Vale despite the order of the court dated 12 February 1993.

Further, Madam Chun, as a director of both Airport Auto and Golden Vale, accepted the transfer of Lot 208 to Golden Vale which then charged Lot 208 to BSN Commercial Bank (M) Sdn. for the benefit of another company Jati Erat Sdn. Bhd., thereby distancing the land from Hong Huat.

In my view, the abovesaid conduct of Madam Chun both individually and through her husband Wu had been cumulatively designed for the purpose of defrauding Hong Huat ie, to deprive Hong Huat of the rights and interest under the sale and purchase agreement and that would, clearly constitute fraud as defined in s. 17(d) of the Contracts Act 1950 which, where relevant, merits reproduction as follows:

> "Fraud" includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto ...:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) any other act fitted to deceive;

"Fraud" within the ambit of s. 17(d) is not criminal fraud but civil fraud for which the standard of proof is that applicable in civil cases ie, on a balance of probabilities.

Section 17 was considered by the Federal Court in *Ang Seng Hiok, supra,* where Mohamed Azmi FCJ (as he then was) held, *inter alia,* that where the allegation of fraud was purely civil in nature, the civil standard was applicable.

Mokhtar Sidin JCA who delivered the judgment of the Court of Appeal in *Ong Ban Chai, supra,* applied the same principle.

In the instant case, I am of the view that in respect of fraud under s. 17(d) above, Hong Huat which bears the burden of proof has discharged that burden to the standard based on a balance of probabilities ie, it is probably true that Madam Chun, through the functionary of her husband Wu and as the alter ego of Golden Vale and Airport Auto, has defrauded Hong Huat.

As Madam Chun through her husband Wu had at the material time been in effective control of Golden Vale and Airport Auto which were engineered by them as their extensions to defraud Hong Huat's interest and right under the sale and purchase agreement in relation to the undivided share in Lot 208, I hold that in the interest of justice, it is fitting and proper that the corporate veil of Golden Vale and Airport Auto be lifted, which I hereby do, and that Madam Chun had at all material time been the alter ego of Golden Vale and Airport Auto.

Conclusion

On the foregoing grounds, I hold that Golden Vale has failed to prove its claim against Hong Huat on a balance of probabilities. Hence, I dismiss Golden Vale's claim with costs.

I also hold that Hong Huat has proved its claim against Airport Auto on a balance of probabilities, for which I give judgment in terms as adumbrated above, with a consequential order that damages be assessed by the learned registrar of this court. Hong Huat is also awarded interest at 8% per annum on the damages, from the date of judgment to the date of realisation.

As against Madam Chun, I make an order that Madam Chun do cause Golden Vale to specifically transfer to Hong Huat the undivided share in Lot 208.

I also allow Hong Huat's counterclaim against Golden Vale.

Finally, I also order that taxed costs be borne and paid by Golden Vale, Airport Auto and Madam Chun to Hong Huat.